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TABLE OF CASES AND OTHER AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 70-40

MARY DOE, *et al.*,

Appellants,

—against—

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON, as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta, Georgia,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,

Appellants,

JAMES HUBERT HALLFORD, M.D.,

Appellant-Intervenor,

—against—

HENRY WADE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF OF AMERICAN ETHICAL UNION, AMERICAN FRIENDS SERVICE COMMITTEE, AMERICAN HUMANIST ASSOCIATION, AMERICAN JEWISH CONGRESS, EPISCOPAL DIOCESE OF NEW YORK, NEW YORK STATE COUNCIL OF CHURCHES, UNION OF AMERICAN HEBREW CONGREGATIONS, UNITARIAN UNIVERSALIST ASSOCIATION, UNITED CHURCH OF CHRIST AND THE BOARD OF CHRISTIAN SOCIAL CONCERNS OF THE UNITED METHODIST CHURCH AS *AMICI CURIAE* IN SUPPORT OF THE APPELLANTS'[1] POSITION

The Constitutional Provisions and Statutes Involved

The First Amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . .

The Fifth Amendment to the Constitution of the United States:

> . . . nor shall any person . . . be deprived of life, liberty or property, without due process of law. . . .

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[1] Appellants in No. 70-40 whose names do not appear in the caption are: PETER G. BOURNE; ROBERT HATCHER; LILLAS L. JAMES; JAMES WATERS; CORBETT TURNER; NEWTON LONG; EDWARD LEADER; WILLIAM H. BIGGERS; GEORGE VIOLIN; PATRICIA S. SMITH; JENNIE WILLIAMS; JUDITH BOURNE; SUZANNE DUNAWAY; JOYCE PARKS; LOU ANN IRION; MARY LONG; J. EMMETT HERNDON; SAMUEL L. WILLIAMS; EUGENE PICKETT; RICHARD DEVOR; DONALD DAUGHTRY; JUDITH ZORACH and KAREN WEAVER, residents of the State of Georgia; PLANNED PARENTHOOD ASSOCIATION OF ATLANTA, INC., a Georgia corporation; and GEORGIA CITIZENS FOR HOSPITAL ABORTION, INC., a Georgia corporation, for and on the behalf of all persons and organizations similarly situated.

The Ninth Amendment to the Constitution of the United States:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

The Fourteenth Amendment to the Constitution of the United States:

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The Georgia abortion laws:

> Georgia Code § 26-1201. Criminal Abortion
>
> Except as otherwise provided in Section 26-1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion. (Acts 1968, pp. 1249, 1277.)
>
> Georgia Code § 26-1202. Exception
>
> (a) Section 26-1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended,

based upon his best clinical judgment that an abortion is necessary *because*:

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would be very likely to be born with a grave, permanent, and irremediable mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.[2]

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84-9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their

[2] The italicized portions were held unconstitutional by the District Court in *Doe* v. *Bolton*, 319 F. Supp. 1048 (N.D. Ga.).

judgment necessary *because of one or more of the reasons enumerated above.*

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made to any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent

files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director of the State Department of Public Health within ten (10) days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to Paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person. (Acts 1968, pp. 1249, 1280)

Georgia Code § 26-1203. Punishment

A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years. (Acts 1968, pp. 1249, 1280.)

The Texas Abortion Laws:

2A Texas Penal Code, Article 1191. Abortion.

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an

abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth be caused. Acts 1907, p. 55.

2A Texas Penal Code, Article 1192. Furnishing the means.

Whoever furnishes the means for procuring an abortion knowing the purpose intended is an accomplice.

2A Texas Penal Code, Article 1193. Attempt at abortion.

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

2A Texas Penal Code, Article 1194. Murder in producing abortion.

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

2A Texas Penal Code, Article 1196. By medical advice.

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

Statement of the Case

The Appellants in these cases are representatives of the classes of married and unmarried pregnant women who want but cannot obtain lawful abortions, married couples for whom abortions may become necessary because they cannot use effective contraceptive devices, and physicians, nurses, social workers and ministers who are regularly consulted about abortion. The Appellants sought judgments declaring the abortion laws of Georgia and Texas to be unconstitutional and restraining the enforcement of the laws.

In the Georgia case, *Doe* v. *Bolton*, 319 F. Supp. 1048 (N.D. Ga.), the District Court held unconstitutional the portion of the Georgia abortion law that limited the class of permitted abortions to those performed because the pregnant woman's life or health is endangered, or the foetus may have a grave defect or the pregnancy resulted from rape. The Court also struck down the provision for an action on behalf of the foetus to complain of contemplated abortion. The Court held that those portions of the statute "unduly [restrict] a decision sheltered by the Constitutional right of privacy." 319 F. Supp. at 1056. Under the remaining portions of the Georgia statute, abortion at any stage of pregnancy is a crime unless performed in an "accredited" hospital on a Georgia resident by a licensed physician "upon his best clinical judgment [in writing] that an abortion is necessary". The physician's judgment must be "concurred in [in writing] by at least two other physicians" and "approved in advance by a committee of the medical staff of the [accredited] hospital in which the operation is to be performed". The *Amici* support the

decision of the Georgia District Court to the extent it holds portions of the abortion law unconstitutional.

In the Texas case, *Roe* v. *Wade*, 314 F. Supp. 1217 (N.D. Texas), the three-judge District Court declared the Texas abortion laws unconstitutional because they "deprive single women and married couples of . . . the right of choice over events which, by their character and consequence, bear in a fundamental manner on the privacy of individuals". 314 F. Supp. at 1221. The statute provided that abortion at any stage of pregnancy was a crime unless "procured or attempted by medical advice for the purpose of saving the life of the mother". 2A Texas Penal Code Article 1196. The *Amici* support the decision of the Texas District Court.

Neither statute permits an abortion on the ground the woman does not want, or the woman and her husband do not want, a child.

Injunctive relief was denied in both cases. In the Georgia case standing was denied to all Appellants except Mary Doe, a married pregnant woman, as representative of her class, and in the Texas case to all Appellants except Jane Roe, an unmarried pregnant woman, as representative of her class.

Appellants in both cases appealed to this Court from the denial of injunctive relief, the denial of standing, and in the Georgia case also from the declaratory judgment. On May 3, 1971, the Court granted review of both cases but postponed the question of jurisdiction to the hearing on the merits.[3]

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[3] There are no cross-appeals. The appeal of the State of Georgia was dismissed for want of jurisdiction. *Bolton* v. *Doe*, —— U.S.

The *Amici* address only the substantive constitutional issues raised by both appeals. The appeal in the Texas case is only from the denial of injunctive relief and of standing to certain Appellants. Nevertheless, the *Amici* consider it their duty to brief the merits of the Texas case in the event the Court grants Texas' application for a review of the merits. Reply to Jurisdictional Statement, at 6-7.

Interest of Amici

The American Ethical Union is a membership corporation formed under the laws of New York. The Union represents 24 Ethical Culture Societies and Fellowships in the United States. The Union was founded to promote religious and philosophical purposes.

The American Friends Service Committee, Inc., is a nonprofit corporation chartered under the laws of the State of Delaware. The Committee's purpose and object is to engage in religious, charitable, social, philanthropic and relief work in the United States and in foreign countries on behalf of, and to promote the general purpose of, the several branches and divisions of the Religious Society of Friends in America. A major program of the Committee concerns education about family planning, family living, population and demographic trends.

The American Humanist Association is incorporated as a religious corporation under California law to express a common concern with the dignity and rights of all human

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—, 29 L. Ed.2d 104. The State of Texas noticed an appeal to this Court but never docketed it. The State wrote in its Reply to Jurisdictional Statement (at 6): "Since the filing of its Notice of Appeal to this Court (Appendix D), Appellees herein have determined that the only forum available to them for appeal from the judgment below is to the Fifth Circuit".

beings. The Association represents approximately 3,500 members in the United States.

The American Jewish Congress is a national organization of American Jews having approximately 30,000 members in the United States. The Congress was founded to protect fundamental freedoms of all Americans.

The Episcopal Diocese of New York is the central organization representing 225 Episcopal churches in southern New York State. The churches have approximately 122,000 individual members. The Diocese has resolved that "abortion is a matter of individual conscience to be exercised within the context of one's own faith and established medical practice".

The New York State Council of Churches is a religious corporation formed under New York law to promote common interest among Protestant churches. The Council represents 5,000 churches of 29 denominations with a total membership of approximately 1,500,000 people. The Council made a public statement of its belief that "abortion is properly a matter of individual conscience to be exercised within the context of one's own faith and established medical practice".

The Union of American Hebrew Congregations is a religious corporation formed under Ohio law. The Union consists of approximately 700 Reform Jewish congregations in the United States with a membership of approximately 1,000,000 people. The Union has publicly stated its opposition to unreasonably restrictive abortion laws.

The Unitarian Universalist Association, a religious corporation incorporated under the laws of the Commonwealth of Massachusetts, represents 1,038 churches and fellow-

ships in the United States and Canada having a membership of approximately 164,000 people. The Association has publicly stated its opposition to criminal abortion laws.

The United Church of Christ represents 7,000 churches in the United States with a membership of approximately 2,000,000 people. The United Church has publicly stated its opposition to criminal abortion laws.

The Board of Christian Social Concerns is an agency of the United Methodist Church. The United Methodist Church consists of 41,000 churches in the United States having a membership of approximately 11,000,000 people. The United Methodist Church has publicly stated its opposition to laws making abortion a crime.

All the *Amici* seek leave to file this brief in support of the Appellants' position on the merits in these cases because they oppose legislation that interferes with the liberty of an individual to exercise his or her own conscience in the conduct of his or her personal life, free of unwarranted governmental interference. The *Amici* believe the Georgia and Texas abortion laws interfere with that liberty.

The *Amici* do not advocate abortion. They do advocate the right of individuals to be free from State interference in the conduct of their private lives. That freedom includes the determination whether or not to have a child. If an individual does not want a child, the *Amici* believe he or she should be free to use means to that end consistent with the woman's health and safety.

ARGUMENT

The Georgia and Texas abortion laws unjustifiably restrict the reserved constitutional liberty of all persons to conduct their private lives without unwarranted governmental interference.

A. *The abortion laws at issue, touching on personal and private aspects of marriage, sex, the family, and family size, invade the right of privacy.*

The Constitution of the United States guarantees that citizens shall retain the liberty—that has come to be known as the "right of privacy"—to conduct their personal lives with dignity and without unwarranted State interference. The States may not infringe personal liberty unless the States demonstrate that the statute narrowly serves "a subordinating interest which is compelling". *Bates* v. *City of Little Rock*, 361 U.S. 516, 524; *Griswold* v. *Connecticut*, 381 U.S. 479, 485.

In *Griswold* v. *Connecticut*, 381 U.S. 479, seven Justices of the Court agreed, albeit on varying constitutional grounds, that a law forbidding the use of contraceptives as a birth control measure was an unwarranted interference with individual liberty because it prevented married and unmarried individuals from determining for themselves the personal question whether or not or when to have children. The Georgia and Texas abortion laws also invade the fundamental right of privacy because they prevent married and unmarried individuals from taking steps necessary to limit the number of children they shall have.

The opinion of the Court in *Griswold*, 381 U.S. at 479-486, traced the development of the constitutional concept of the

sanctity of the individual and determined that the right of privacy is derived from the "penumbras" of the "specific guarantees in the Bill of Rights . . . formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484. The concurring opinions in *Griswold* stressed that the Ninth and Fourteenth Amendments to the Constitution contemplate a reservoir of unspecified personal rights now encompassed in the term "right of privacy" that the people had not delegated, and should never be compelled to delegate, to a State or the Federal Government.

> "The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments." 381 U.S. at 492 (concurring opinion of Mr. Justice Goldberg, joined in by Mr. Chief Justice Warren, and Mr. Justice Brennan).

Mr. Justice Harlan, concurring in the judgment, wrote (381 U.S. at 500):

> "In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325. For reasons stated at length in my dissenting opinion in Poe v. Ullman, supra [367 U.S. 497, 522, at 539-545], I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not depen-

> dent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom."

Mr. Justice White also concurred in the judgment on the ground that the Fourteenth Amendment protected personal liberties not enumerated in the Constitution. 381 U.S. at 502.

Indeed, *Publius*, author of The Federalist, observed that the Constitution as originally drafted, before the adoption of the first ten Amendments, "is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." The Federalist, No. 84 (Hamilton) at 561, Mod. Lib. Ed., 1937 (capitals in the original).

> "Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations. 'WE THE PEOPLE of the United States, to secure the blessing of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America.' Here is a better recognition of popular rights, than volumes of . . . aphorisms . . . which would sound much better in a treatise of ethics than in a constitution of government.
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> "But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns." *Ibid.* at pp. 558-559 (Emphasis in the original).

The same considerations stressed in *Griswold* govern the constitutionality of the Georgia and Texas laws that make

abortion a criminal act unless performed for State-approved reasons. The abortion laws' direct encroachment on the constitutional right of privacy cannot be countenanced. The laws are invalid on their face, for their reach is broader than any compelling governmental interest.[4] *Griswold* v. *Connecticut*, 381 U.S. 479, 485; *Shapiro* v. *Thompson*, 394 U.S. 618, *passim*; *NAACP* v. *Alabama*, 377 U.S. 288, 307; *Sherbert* v. *Verner*, 374 U.S. 398, 407; *Bates* v. *City of Little Rock*, 361 U.S. 516, 524. The abortion laws interfere no less with married and unmarried persons' decisions whether to have children than did the Connecticut law prohibiting the use of contraceptives that this Court struck down in *Griswold* v. *Connecticut*, 381 U.S. 479.

> "Abortion touches intimate affairs of the family, of marriage, of sex, which in Griswold v. Connecticut, 381 U.S. 479, we held to involve rights associated with several express constitutional rights and which are summed up in 'the right of privacy.'" *United States* v. *Vuitch*, 402 U.S. 62, at 78 (dissenting opinion of Mr. Justice Douglas).[5]

Several lower Federal and State Courts recognized that, like laws restricting the use of contraceptives,[6] laws

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[4] See Subdivision B of this Brief, at p. 20.

[5] In *United States* v. *Vuitch*, the majority of the Court expressly did not reach the issue of the constitutional right of privacy presented on these appeals. The District Court held the District of Columbia abortion law unconstitutional on the sole ground that the statute was unconstitutionally vague. On the appeal, this Court disagreed and reversed the decision, but did not pass upon "arguments . . . based on this Court's decision in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). . . . Since that question of vagueness was the only issue passed upon by the District Court it is the only issue we reach here." 402 U.S. at 72-73.

[6] *Griswold* v. *Connecticut*, 381 U.S. 479.

limiting a parent's right to teach his children,[7] laws requiring that individuals be sterilized,[8] laws preventing interracial marriages[9] and laws that restrict the right to travel,[10] restrictive criminal abortion laws also

> "[constitute] an intrusion on constitutionally protected areas too sweeping to be justified as necessary to accomplish any compelling state interest. . . . ¶ We cannot distinguish the interests asserted by the plaintiffs in this case from those asserted in *Griswold*. . . . We believe that *Griswold* and related cases establish that matters pertaining to procreation, as well as to marriage, the family, and sex are surrounded by a zone of privacy which protects activities concerning such matters from unjustified governmental intrusion." *Doe* v. *Scott*, 321 F. Supp. 1385, 1389-90 (N.D. Ill.), appeals docketed (Nos. 70-105 and 70-106, Oct. 1971 Term).

Accord, *Roe* v. *Wade*, 314 F. Supp. 1217, 1222-23 (N.D. Tex.); *Babbitz* v. *McCann*, 310 F. Supp. 293, 299 (E.D. Wisc.), appeal dismissed *sub nom. McCann* v. *Babbitz*, 400 U.S. 1; *People* v. *Belous*, 71 Cal.2d 954, 963; 80 Cal. Reptr. 354, 359; 458 P.2d 194, 199, cert. denied, 397 U.S. 915; *People* v. *Barksdale*, —— Cal. App.2d ——, —— P.2d —— (Docket No. 1 Crim. 9526, Ct. App., 1st App. Dist., July 22, 1971, slip opinion p. 16); and *State* v. *Munson*, unreported (S.D. Cir. Ct., Pennington Co., April 6, 1970), (portions appended to dissenting opinion in *Rosen* v. *Loui-*

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[7] *Meyer* v. *Nebraska*, 262 U.S. 390.

[8] *Skinner* v. *Oklahoma*, 316 U.S. 535.

[9] *Loving* v. *Virginia*, 388 U.S. 1.

[10] *Shapiro* v. *Thompson*, 394 U.S. 618; *United States* v. *Guest*, 383 U.S. 745.

siana, 318 F. Supp. 1217, at 1245). *Cf., United States ex rel. Williams* v. *Follette,* 313 F. Supp. 269, 273 (S.D.N.Y.). The District Court in the Georgia case held the statute in part unconstitutional "because such action [by the State] unduly restricts a decision sheltered by the Constitutional right to privacy." *Doe* v. *Bolton,* 319 F. Supp. 1048, at 1056 (N.D. Ga.).

The recognition that the Constitution protects an individual's private life from becoming an affair of state is not new. In *Skinner* v. *Oklahoma,* 316 U.S. 535, 541, the Court struck down a compulsory sterilization law stating, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race". An anti-miscegenation statute was held unconstitutional in *Loving* v. *Virginia,* 388 U.S. 1, 12, because it deprived the defendants

> "of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment . . . . Under our Constitution the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."

In *Meyer* v. *Nebraska,* 262 U.S. 390, 399, the Court held that a state may not intrude on a parent's decision to teach a foreign language to his child because the guaranty of liberty in the Fourteenth Amendment protects

> "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates

> of his own conscience, and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Fundamental personal liberties are also infringed by abortion laws that are not limited to the protection of health and safety.

B. *The Georgia and Texas abortion laws may not be sustained as a valid exercise of the police power.*

The exercise of personal constitutional liberties may not be abridged by State law unless the State demonstrates that the statute narrowly serves an overriding and compelling State interest. *Griswold* v. *Connecticut,* 381 U.S. 479, 485; *Bates* v. *City of Little Rock,* 361 U.S. 516, 524; *NAACP* v. *Alabama,* 377 U.S. 288, 307.

It cannot seriously be questioned that the Georgia and Texas abortion laws encroach on the liberty to conduct one's private life. The States urge, however, that the "police power" justifies the abortion laws' restriction of that liberty. The justification does not meet the constitutional test, for the statutes are not limited to a legitimate exercise of the police power. They do not merely regulate by whom or when abortions may safely be performed but they limit the very use of abortion as a therapeutic measure by married and unmarried persons. The statute struck down in *Griswold* forbade (381 U.S. 479, at 485):

> "the *use* of contraceptives rather than regulating their manufacture or sale, . . . [and sought] to achieve its goals by means having a maximum destructive impact upon that relationship [marriage]. Such a law cannot stand in the light of the familiar principle, so often

applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms'. NAACP v. Alabama, 377 U.S. 288, 307" [emphasis in the original].

1. The States may enact safety measures to protect the public from dangerous abortions but the protection of the public health is not served, indeed the opposite effect is achieved, by the laws under consideration that make criminal virtually all abortions, or all abortions judged not "necessary", or all abortions performed on non-residents.

The abortion laws cannot stand as health measures. The Georgia statute's elaborate structure requiring three successive concurring approvals in writing by doctors and committees of doctors and a patient's sworn statement of residence within the State before an abortion may lawfully be performed, does not serve any proper concern for the public health. See *People* v. *Barksdale,* —— Cal. App.2d ——, —— P.2d ——, (Docket No. 1 Crim. 9526, Ct. App., 1st App. Dist. July 22, 1961), slip opinion at 20. Indeed, this cumbersome procedure creates a health hazard. The inevitable delay almost ensures that approved abortions will not be performed in the "safe" twelve-week period following conception. See Appellants' Jurisdictional Statement in the Georgia case, at pp. 10-11.

The District Court intended to broaden women's access to abortion under the Georgia statute, for it found the State may not constitutionally limit the reasons for which abortions may be performed. *Doe* v. *Bolton,* 319 F. Supp.

1048, at 1056. The decision has the opposite effect, for it transfers to doctors the unfettered power to determine why or when an abortion is "necessary".

As modified by the District Court, the Georgia statute makes all abortions criminal except those doctors judge to be "necessary". This formulation does not set any standard at all, least of all a standard relating to the public health, for the doctors' exercise of their judgment. Certainly it does not call for medical judgment alone. The questions doctors are competent to answer about abortion are whether the woman is, in fact, pregnant, whether her health will be impaired by the operation, whether the stage or character of the pregnancy indicates undue risk in performing the operation, etc. The question whether the abortion is "necessary" calls for a "moral" as well as a medical decision about a patient's personal life by a team of doctors who are likely to be strangers to the woman, or the woman and her husband, and to their private plans about family size or whether to have children at all. The statute as construed substitutes the doctors' several consciences for the patient's in a critical personal decision.

As originally drafted the statute's standards for permitted abortions also did not serve any State interest in public health. The law prohibited a doctor from performing and a patient from having an abortion the doctor would otherwise approve as medically sound; that is, an abortion sought early in pregnancy on the ground that the woman does not want a child. The denial to a patient of access to medically approved treatment injures rather than promotes public health.

It is commonly recognized that the unavailability of or severely limited access to lawful, safe abortions results in

women submitting to criminal abortionists. The public health problem due to the after-effects of criminal abortion is near epidemic. See, *e.g.*, authorities referred to in *People* v. *Belous*, text and fns. 7, 9 and 10, 71 Cal.2d 954, 965-66, 80 Cal. Rptr. 354, 361, 458 P.2d 194, 201, cert. denied 397 U.S. 915. A woman risks serious physical injury, sterility or even death at the hands of criminal abortionists. "Far from protecting human life . . . [the statutes] tend in practice to destroy it." *Rosen* v. *Louisiana*, 318 F. Supp. 1217, at 1223 (E.D. La.) appeal docketed (No. 70-42, Oct. 1971 Term) (dissenting opinion). Accord, *Doe* v. *Scott*, 321 F. Supp. 1385, 1390-1391 (N.D. Ill.).

Health considerations do not justify the requirement in the Georgia law that abortions be performed in "accredited" hospitals. Medical experience with abortions performed in adequately staffed out-patient clinics has been favorable. See statistics reported in *The New York Times*, June 30, 1971, p. 43, cols. 4-8. There certainly isn't any compelling reason to limit abortions to the relatively few "accredited" hospitals in Georgia. Appellants' Jurisdictional Statement, pp. 18-19. The medical profession has recognized that termination of an early pregnancy is a relatively simple and safe procedure with fewer risks to health than pregnancy itself. See *People* v. *Belous*, text and authorities cited at fn. 7, 71 Cal.2d 954, at 965, 80 Cal. Rptr. 354, at 361, 458 P.2d 194, at 201, cert. denied 397 U.S. 915. Abortions like other simple surgical procedures can safely be performed in licensed hospitals (or clinics) that do not meet "accreditation" standards. In *People* v. *Barksdale*, —— Cal. App.2d —— (Docket No. 1 Crim. 9526, Ct. App. 1st App. Dist. July 22, 1961), a requirement that abortions be performed only in "accredited" hospitals was struck down as "an unnecessary and unrea-

sonable restraint upon the constitutionally guaranteed right under discussion" (slip opinion pp. 19-20).

Similarly, the requirements that the prospective patient prove (Georgia Code §26-1202(b)(1)) and that her physician certify (Georgia Code §26-1202(b)(2)) that she is a Georgia resident, do not accomplish any legitimate state purpose in protecting the public health. The obvious purpose of the requirements is to prevent non-resident patients from seeking abortions. Such a rationale does not justify limiting the federally guaranteed liberties of women who do not reside in Georgia.

The provisions regarding residency may also violate another fundamental constitutional right of all citizens: namely, the right to travel. In *Corkey* v. *Edwards*, 322 F. Supp. 1248, 1254 (W.D. N. Car.) a three-judge Court held a four-month residency requirement in the state abortion law an unconstitutional invasion of the right to travel. The Court relied on *Shapiro* v. *Thompson*, 394 U.S. 618 (in which a one-year residency requirement for welfare benefits was held a violation of the right to travel); and *United States* v. *Guest*, 383 U.S. 745 (in which the right to travel was declared a fundamental constitutional liberty). The Court in *Corkey* indicated that even if the waiting period were deleted, "flat exclusion of non-residents" (such as that in the Georgia abortion law) would still offend the Constitution. 322 F. Supp., at 1254-1255.

The Texas statutes do not remotely resemble health legislation for they do not contain any medical standards for the performance of the narrowly drawn class of permitted abortions. There isn't even a requirement that permitted abortions be performed by licensed doctors. See opinion of the District Court below in *Roe* v. *Wade*, 314 F. Supp. 1217, at 1223, fn. 15.

2. The laws cannot be justified as a restriction on "immoral" sexual behavior, because the laws also penalize marital sexual relations.

The power to regulate immoral sexual conduct cannot responsibly be urged by the Appellees as a justification for the statutes in question. Here, as in *Griswold* v. *Connecticut* (381 U.S. 479, 498, concurring opinion):

> "...it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. See Aptheker v. Secretary of State, 378 U.S. 500, 514; NAACP v. Alabama, 377 U.S. 288, 307-308; McLaughlin v. Florida, supra, 379 U.S. [184] at 196."

Accord, *Babbitz* v. *McCann,* 310 F. Supp. 293, 301 (E.D. Wisc.), appeal dismissed *sub nom. McCann* v. *Babbitz,* 400 U.S. 1.

3. The States' claimed duty to preserve the right of a foetus to be born is not a valid justification for encroaching on personal liberties, for:

a. A foetus doesn't have a "right" to be born; but if it did, that right would be outweighed by the liberty of women, or women and their husbands, to determine whether or not to have children.

The States claim the abortion laws are justified by a compelling state interest in the foetus. The claim cannot legitimately be based on a foetus' right to birth for there is no such "right". The constitutional guarantees of the Fifth and Fourteenth Amendments apply only to "per-

sons" and "citizens." Citizenship, of course, is accorded only on birth, and not at conception: *Montana* v. *Rogers*, 278 F.2d 68, 72 (7th Cir.), aff'd *sub nom. Montana* v. *Kennedy*, 366 U.S. 308.

The Georgia District Court expressly declined to rule that the foetus has a civil right to birth, holding: "the Court does not postulate the existence of a new being with federal constitutional rights at any time during gestation," *Doe* v. *Bolton*, 319 F. Supp. 1048 at 1055, fn. 3.[11] The Court also declared unconstitutional Georgia Code §26-1202(c) that purported to create a right of action in an unborn foetus to complain of contemplated abortion. 319 F. Supp. at 1056.

Criminal abortion laws are not designed to protect rights of a foetus. In neither Georgia nor Texas is the destruction of a foetus at any state of pregnancy a homicide. *Passley* v. *State*, 194 Ga. 327, 329-330, 21 S.E.2d 230, 232; and see the statutes at issue on these appeals, Georgia Code §§26-1201, 26-1202, 26-1203; 2A Texas Penal Code Articles 1191-1194, 1196.[12] In Texas "a woman who commits an abortion on herself is guilty of no crime, she being regarded rather as the victim than the perpetrator of the crime." *Fondren* v. *State*, 74 Crim. Rep. 552, 557, 169 S.W. 411, 414. See also *Hammett* v. *State*, 84 Tex. Crim. Rep.

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[11] An appeal to this Court from the District Court's denial of a motion to intervene to assert the foetus' constitutional rights was dismissed for want of jurisdiction *sub nom. Unborn Child of Mary Doe* v. *Doe*, —— U.S. ——, 29 L. Ed.2d 104.

[12] The crime of foeticide, defined as the "willful killing of an unborn child so far developed as to be ordinarily called 'quick', formerly recognized in Georgia (Georgia Code §26-9921a), was apparently superseded by the new statute that is before the Court. 2A Texas Penal Code Article 1195 makes it a crime but not a homicide to destroy a live child who is in the process of being born.

635, 638, 209 S.W. 661, at 661, holding that the woman upon whom an abortion is performed is not an accomplice in the crime; and Texas' Reply to Jurisdictional Statement at 5. The rule is the same in Georgia. *Wolcott* v. *Gaines*, 225 Ga. 373, 374, 169 S.E.2d 165, 166.

Other purported rights of the unborn, such as the right to inheritance and the right of action in tort, do not vest unless there is a live birth. *Hill* v. *Lang*, 211 Ga. 484, 489, 86 S.E.2d 498, 502; *Leal* v. *Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820, 821 (Tex. Sup. Ct.). See also discussion in Dachs, "Liability for Wrongful Harm to the Unborn," 166 N.Y. Law Journal No. 22, p. 1, col. 4 (August 2, 1971) part 1, at p. 4, cols. 3-4, and 166 N.Y. Law Journal No. 23, p. 1, col. 4 (August 3, 1971), part 2. Dachs concluded (166 N.Y. Law Journal No. 23, at p. 4, col. 4): "The unborn, as such, has no legal standing and its complete destruction prior to birth brings into being no rights in its favor. This is so because in legal contemplation it is nothing."

In *In re Peabody*, 5 N.Y.2d 541, 547, 186 N.Y.S.2d 265, 270, 158 N.E.2d 841, 844, the Court of Appeals of New York held that in trust, estate and tort cases, "a child *en ventre sa mere* is not regarded as a person until it sees the light of day." More recently in *Endresz* v. *Friedberg*, 24 N.Y.2d 478, 485, 301 N.Y.S.2d 65, 70, 248 N.E.2d 901, 904, the Court of Appeals reaffirmed its holding in *Peabody* and stated:

> "... even if, as science and theology teach, the child begins a separate 'life' from the moment of conception, it is clear that, 'except in so far as is necessary to protect the *child's* own rights' (Matter of Roberts, 158 Misc. 698, 699, 286 N.Y.S. 476, 477, *supra*), the law has never considered the *unborn foetus* as having a

> separate 'juridical existence' (Drabbels v. Skelly Oil Co., 155 Neb. 17, 22, 50 N.W.2d 299) or a legal personality or identity 'until it sees the light of day.' (Matter of Peabody, 5 N.Y.2d 541, 547, 186 N.Y.S.2d 265, 270, 158 N.E.2d 841, 844, 845 *supra*)" (emphasis ours).

See also *People* v. *Belous*, 71 Cal.2d 954, 80 Cal. Rptr. 354, 362, 458 P.2d 194, 202, cert. denied 397 U.S. 915.

The States may argue that the foetus nevertheless has some claim to State protection. The State of Texas tried to convince the District Court that the statute is justified by the State's duty to protect the "quickened foetus". The District Court disagreed and held the statute overly broad to serve the alleged interest, because *all* abortions were prohibited regardless of the foetal term. *Roe* v. *Wade*, 314 F. Supp. 1217, at 1223 (N.D. Tex.). The Georgia statute is similarly broad, for it, too, does not distinguish abortions before "quickening" from those performed afterward.

Apart from the objection of overbreadth, the argument must fall, for if the foetus has a right to protection, it is outweighed by the greater constitutional liberty of persons to determine whether they shall have children. As the three-judge Court in Illinois wrote, *Doe* v. *Scott*, 321 F. Supp. 1385 (N.D. Ill.) at 1391:

> "a statute which forces the birth of every fetus, no matter how defective or how intensely unwanted by its future parents, displays no legitimately compelling state interest in fetal life, especially when viewed with regard for the countervailing rights of pregnant women. We do not believe that the state has a compelling interest in preserving all fetal life which justi-

fies the gross intrusion on a woman's privacy which is involved in forcing her to bear an unwanted child."

Other Courts have also refused to recognize the claimed supremacy of the foetal entity over the constitutional freedom of people. See *Roe* v. *Wade,* 314 F. Supp. 1217, 1223 (N.D. Tex.); *Babbitz* v. *McCann,* 310 F. Supp. 293, 301 (E.D. Wisc.) appeal dismissed *sub nom. McCann* v. *Babbitz,* 400 U.S. 1; *cf., United States* v. *Vuitch,* 305 F. Supp. 1032, 1035 (D.C. Cir.), rev'd on other grounds, 402 U.S. 62.

In *Babbitz* v. *McCann,* the Court held (310 F. Supp. 293 at 301):

> "The defendants urge that the state's interest in protecting the embryo is a sufficient basis to sustain the statute. Upon a balance of the relevant interests, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question."

The argument in *Doe* v. *Bolton,* 319 F. Supp. 1048, at 1055, that foetal rights predominate because after conception, "the decision to abort its [the foetus'] development cannot be considered a purely private one affecting only husband and wife, man and woman," betrays a limited understanding of the right of privacy. The "privacy" guaranteed by the Constitution and recognized in *Griswold* v. *Connecticut,* 381 U.S. 479, 483, 485, is not limited to activities in the home or between husband and wife, but includes all personal conduct that does not interfere with the rights of others. See also *Meyer* v. *Nebraska,* 262 U.S. 390, 399; *Shapiro* v. *Thompson,* 394 U.S. 618, *passim.* Such

conduct is protected whether undertaken in or out of the home, whether alone or in association with others. A patient's treatment by a physician is not an affair of state. The State may not compel persons to become parents.

It cannot responsibly be argued that the right of privacy does not outweigh a foetus' purported claim to protection because the right of privacy is "only implied or deduced", *i.e.* not enumerated in the Constitution. *Steinberg* v. *Brown,* 321 F. Supp. 741, 748 (N.D. Ohio). The right of privacy does not have inferior status because it is not enumerated. On the contrary, "the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights." *Griswold* v. *Connecticut,* 381 U.S. 479, at 486 (concurring opinion of Mr. Justice Goldberg).

It has been suggested that Courts should not interfere with state legislative decisions relating to abortion. See *Corkey* v. *Edwards,* 322 F. Supp. 1248, 1253-54 (W.D. N. Car.), *Steinberg* v. *Brown,* 321 F. Supp. 741, 748 (N.D. Ohio), and *Rosen* v. *Louisiana,* 318 F. Supp. 1217, 1223, 1224, 1230 (E.D. La.). But no rational explanation was offered why a State legislature should be free to set the extent and limits of federally guaranteed liberties without judicial scrutiny.

> "The vice of . . . [such] views is that it would permit such experimentation by the States in the area of the fundamental personal rights of its citizens. I cannot agree that the Constitution grants such power either to the States or to the Federal Government." *Griswold* v. *Connecticut,* 381 U.S. 479, at 496 (concurring opinion of Mr. Justice Goldberg).

b. The need to encourage population growth, if it ever was a legitimate end of government, is not now a valid justification for invading personal liberties.

The States may argue their interest in the foetus—a potential being—is a legitimate expression of concern in encouraging population growth. Assuming *arguendo* that a government may encourage population growth by persuasion, population growth may not be *compelled* by laws that can be obeyed only at the expense of individual liberties. *Cf., Griswold* v. *Connecticut,* 381 U.S. 479, 496-497 (concurring opinion of Mr. Justice Goldberg); *Skinner* v. *Oklahoma,* 316 U.S. 535, at 536, 541.

Moreover, as Mr. Justice Clark wrote: "procreation is certainly no longer a legitimate or compelling State interest in these days of burgeoning populations." "Religion, Morality and Abortion," 2 Loyola L. Rev. (L.A.) 1, at 9. Indeed, the current debate underscores the necessity for governmental action to *reduce* population growth. See Note, "Legal Analysis and Population Control: The Problem of Coercion", 84 Harv. L. Rev. 1856, 1865, et seq.

c. The religious view that the product of every conception is sacred may not validly be urged by the States as a justification for limiting the exercise of constitutional liberties, for that would be an establishment of religion.

The real basis of the claim of state interest in the foetus is a doctrinaire "moral" concern for the *"potential* of independent human existence". *Doe* v. *Bolton,* 319 F. Supp. 1048 at 1055 (emphasis in the original). The theoretical moral concern is effected only by permitting a greater moral outrage: the deep human suffering of adults and children alike, that results from compelling one to continue

an unwanted pregnancy, to give birth to an unwanted child, and to assume the burdens of unwanted parenthood.

To many minds the "moral" concern for the foetus is misplaced. Reflective judges, scholars and commentators have perceived and deplored the fact that religious beliefs underly the retention of abortion laws. Mr. Justice Clark, wrote in his article "Religion, Morality and Abortion," 2 Loyola L. Rev. (L.A.) 1, at 6:

> "Despite the fact that religious belief continues to permeate our attitude toward abortion, most people today agree with Justice Holmes that 'moral predilections must not be allowed to influence our minds in settling legal distinctions.' [O.W. Holmes, The Common Law]."

In "Abortion" 220 Scientific American No. 1, p. 21, at 21 (January 1969) the scholars Christopher Tietze and Sarah Lewitt traced opposition to abortion to the rise of Jewish and Christian religions. See also *Rosen* v. *Louisiana*, 318 F. Supp. 1217, 1233 (E.D. La.), appeal docketed (No. 70-42, Oct. 1971 Term) (dissenting opinion); and Comment, 23 Vand. L. Rev. 1346, at 1351:

> "The American Law Institute has determined that objections to abortion reform are not primarily grounded on legal considerations but rather on religious beliefs which deem abortion sinful because it cheapens the value of human life."

See also discussion in *United States* v. *Vuitch*, 402 U.S. 62, at 78-79 (dissenting opinion of Mr. Justice Douglas).

No argument is needed to show that the police power cannot be employed in the service of sectarian moral views

without violating the Establishment Clause of the First Amendment. Yet the Georgia District Court recognized a compelling State interest in controlling[13] what it discreetly called "the quality and soundness of the decision" and would have approved a state requirement that women desiring abortions "[consult] with a licensed minister". *Doe* v. *Bolton*, 319 F. Supp. 1048, at 1056.

In *Rosen* v. *Louisiana*, 318 F. Supp. 1217 (E.D. La.), appeal docketed (No. 70-42 Oct. 1971 Term), the majority recognized that the Louisiana abortion laws in effect codified "the official Roman Catholic view" that assigns an undefined value to foetal life from the moment of conception. 318 F. Supp. at 1223, fn. 2, and 1231, fn. 18. The Louisiana District Court, however, characterizing the crime of abortion as a "moral offense" and a "moral wrong", claimed it was powerless to interfere with the State's moral decision. As District Judge Cassibry said in dissent (318 F. Supp. at 1233): "the [abortion] law rather seems to be an effort to enforce certain views of private morality against those not sharing those views".

The writer of "Supreme Court, 1964 Term", 79 Harv. L. Rev. 56, 165, commenting on *Griswold* v. *Connecticut*, 381 U.S. 479, questioned the assumption that particular views of morality are of state concern:

> ". . . the close relationship of moral to religious principles suggests that the first amendment might be taken to forbid governmental regulation of issues of personal conscience unless such regulation has pragmatic justification. (McGowan v. Maryland, 366 U.S.

[13] By giving doctors the power and burden to judge whether an abortion is "necessary" and should be performed.

> 420, at 422-445). The establishment clause does seem to express the judgment that freedom of conscience for the individual is preferable to the possible benefits of enforced uniformity. And the free exercise clause suggests that one should be permitted to act on personal principles as long as his actions do not threaten to disrupt the social order."

See also discussion in Note, "Legal Analysis and Population Control: The Problem of Coercion," 84 Harv. L. Rev. 1856, at 1885-1888, tracing "courts' and legislatures' deepening skepticism toward laws regulating the 'morality' of consensual sexual or sex-related behavior". 84 Harv. L. Rev. at 1887.

In *Griswold* v. *Connecticut,* 381 U.S. 479, the Court held that the right of privacy, whether drawn from the penumbras of the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments, or protected by the Due Process Clause of the Fourteenth Amendment, protects the free exercise of one's views (whether of religious or secular origin) on birth control. State laws such as the abortion laws at issue cannot be justified on the ground that they comport with one group's "moral" condemnation of the exercise of the guaranteed freedom by others.

CONCLUSION

The abortion laws invade the fundamental individual liberty reserved by the Constitution to conduct one's personal life without unwarranted governmental interference, and the laws' infringement of that liberty is not warranted by any overriding valid state interest. For the reasons outlined, (1) the declaratory judgment of the Georgia District Court should be affirmed only to the extent that it held unconstitutional portions of the Georgia abortion law; (2) the remainder of the law should be declared unconstitutional, except that the provision of the Georgia abortion law that requires abortions to be performed by physicians should be sustained; and (3) the declaratory judgment of the Texas Court holding the Texas abortion laws unconstitutional should be affirmed.

Respectfully submitted,

HELEN L. BUTTENWIESER
Attorney for Amici

BONNIE P. WINAWER
Of Counsel

On the Brief:

HELEN L. BUTTENWIESER
BONNIE P. WINAWER